

REL: November 8, 2019

Notice: This opinion is subject to formal revision before publication in the advance sheets of Southern Reporter. Readers are requested to notify the **Reporter of Decisions**, Alabama Appellate Courts, 300 Dexter Avenue, Montgomery, Alabama 36104-3741 ((334) 229-0649), of any typographical or other errors, in order that corrections may be made before the opinion is printed in Southern Reporter.

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2019-2020

1180624

Ex parte Allstate Insurance Company

PETITION FOR WRIT OF MANDAMUS

(In re: Devin Anthony Harrison

v.

Allstate Insurance Company and Thomas Michael Hobson)

(Perry Circuit Court, CV-18-900027)

STEWART, Justice.

Allstate Insurance Company ("Allstate") petitions this Court for a writ of mandamus directing the Perry Circuit Court ("the trial court") to vacate its order denying Allstate's motion to transfer an action filed against it by Devin Anthony

1180624

Harrison in Perry County to Shelby County or Bibb County. We grant the petition and issue the writ.

Facts and Procedural History

On September 4, 2015, Harrison, a resident of Bibb County, was driving an automobile in Perry County. The automobile was owned by Thomas Michael Hobson, a resident of Bibb County ("Hobson"), and was insured by Allstate, whose principal place of business is in Shelby County. Dylan Gardner and Alexander Hobson, Hobson's grandson, were passengers in the vehicle Harrison was driving. While Harrison was driving, the automobile was involved in a single-vehicle accident. Gardner died as a result of injuries sustained in the accident, and Alexander Hobson was injured. Gardner's estate filed a wrongful-death action against Harrison and obtained a \$2 million dollar judgment. At some point, Alexander Hobson also filed an action in the trial court against Harrison and Allstate seeking damages for injuries relating to the accident.

In May 2018, Harrison filed the action underlying this petition in the trial court against Allstate in which he asserted claims of breach of contract and bad faith based on

1180624

Allstate's alleged refusal to defend or indemnify him in the wrongful-death action.¹ Harrison asserted that Hobson had insured the automobile involved in the accident underlying the wrongful-death action with a policy issued by Allstate and that Harrison was a permissive user and was entitled to coverage under the policy. Allstate removed the action to the United States District Court for the Southern District of Alabama. After that court remanded the case to the trial court, Allstate filed a motion to transfer the action to Shelby County or Bibb County, arguing that venue in Perry County was improper. Allstate supported its motion with an affidavit from Nicole Johnson, a claims-service leader for Allstate. Johnson testified in her affidavit, among other things, that

"[a] substantial amount of Allstate's investigation, decision-making and handling of the claim submitted by Mr. Hobson occurred at Allstate's Office in Shelby County, Alabama. Any other claim-related work by Allstate employees on the claim would simply have been in an oversight role by Allstate's Home Office Legal Department in Illinois."

¹In this action, Harrison also asserted a claim of misrepresentation against Hobson. Hobson did not join in Allstate's petition for a writ of mandamus.

1180624

Harrison filed a reply to Allstate's motion for a change of venue in which he argued that the events or omissions giving rise to his action occurred in Perry County because the automobile accident occurred in Perry County and because the wrongful-death action filed by Gardner's estate for which Allstate failed to indemnify him and the action filed by Alexander Hobson had both been filed in Perry County. Harrison did not provide evidentiary materials in support of his argument that venue was proper in Perry County. Allstate moved to strike many assertions in Harrison's response because, it argued, those assertions were not supported by evidence. The trial court did not rule on Allstate's motion to strike and, on April 16, 2019, the trial court entered an order denying Allstate's motion for a change of venue. Allstate timely filed a petition for the writ of mandamus in this Court.

Standard of Review

"The proper method for obtaining review of a denial of a motion for a change of venue in a civil action is to petition for the writ of mandamus.' Ex parte Alabama Great Southern R.R., 788 So. 2d 886, 888 (Ala. 2000). 'Mandamus is a drastic and extraordinary writ, to be issued only where there is (1) a clear legal right in the petitioner to the order sought; (2) an imperative duty upon the respondent to perform, accompanied by a refusal to do so; (3) the lack of another adequate remedy; and

1180624

(4) properly invoked jurisdiction of the court.' Ex parte Integon Corp., 672 So. 2d 497, 499 (Ala. 1995). Moreover, our review is limited to those facts that were before the trial court. Ex parte National Sec. Ins. Co., 727 So. 2d 788, 789 (Ala. 1998).

"'The burden of proving improper venue is on the party raising the issue and on review of an order transferring or refusing to transfer, a writ of mandamus will not be granted unless there is a clear showing of error on the part of the trial judge.' Ex parte Finance America Corp., 507 So. 2d 458, 460 (Ala. 1987). ..."

Ex parte Pike Fabrication, Inc., 859 So. 2d 1089, 1091 (Ala. 2002).

Discussion

Allstate argues that venue in Perry County is improper and that the trial court should have transferred the action to Shelby County or Bibb County pursuant to § 6-3-7, Ala. Code 1975. That statute governs the venue of actions against foreign and domestic corporations and provides:

"(a) All civil actions against corporations may be brought in any of the following counties:

"(1) In the county in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of real property that is the subject of the action is situated; or

"(2) In the county of the corporation's principal office in this state; or

"(3) In the county in which the plaintiff resided, or if the plaintiff is an entity other than an individual, where the plaintiff had its principal office in this state, at the time of the accrual of the cause of action, if such corporation does business by agent in the county of the plaintiff's residence; or

"(4) If subdivisions (1), (2), or (3) do not apply, in any county in which the corporation was doing business by agent at the time of the accrual of the cause of action."

This Court has stated: "If venue is improper at the outset, then upon motion of the defendant, the court must transfer the case to a court where venue is proper." Ex parte Perfection Siding, Inc., 882 So. 2d 307, 309 (Ala. 2003) (citing Ex parte Pike Fabrication, 859 So. 2d at 1091).

We must, therefore, determine whether venue is proper in Perry County under any of the provisions in § 6-3-7(a). Neither party disputes that venue would be improper in Perry County under § 6-3-7(a) (2) because Allstate's principal office in Alabama is located in Shelby County. Likewise, there appears to be no dispute that venue in Perry County would be improper under § 6-3-7(a) (3), because Harrison resides in Bibb County. If venue is proper in Shelby County under § 6-3-7(a) (1) or in Bibb County under § 6-3-7(a) (3), the

1180624

catchall provision of § 6-3-7(a)(4) would not apply to render venue proper in Perry County. The dispute thus is whether, under § 6-3-7(a)(1), a substantial part of the events or omissions giving rise to Harrison's claims against Allstate occurred in Perry County.

Allstate argues that the events or omissions giving rise to Harrison's claims pertain to the investigation and handling of Hobson's insurance claim and the decision not to defend or indemnify Harrison in the wrongful-death action filed by Gardner's estate. Allstate asserts that those actions occurred at its principal office in Shelby County. Harrison argues that because the automobile accident occurred in Perry County and because the litigation against him was filed in Perry County, a substantial part of the events or omissions giving rise to his claims against Allstate occurred in Perry County.

In his complaint, Harrison asserted against Allstate claims of breach of contract and bad faith based on Allstate's alleged failure to defend and/or indemnify Harrison in the wrongful-death action filed in Perry County and Allstate's alleged failure or refusal to pay the judgment entered against Harrison in that action. In Ex parte Pikeville Country Club, 844 So. 2d 1186, 1189 (Ala. 2002), this Court explained that

1180624

the phrase "'the events or omissions giving rise to the claim'" in § 6-3-7(a)(1) is "a clear reference to the wrongful acts or omissions of the corporate defendant" and, applying Ex parte SouthTrust Bank of Tuscaloosa County, N.A., 619 So. 2d 1356 (Ala. 1993), we explained that venue is proper in the county where the corporate defendant's alleged wrongful act or omission occurred, not where the injury or damage resulting from the wrongful act or omission was suffered. "In Ex parte Suzuki Mobile, Inc., 940 So. 2d 1007, 1009-10 (Ala. 2006), this Court noted that, under § 6-3-7, 'the inquiry is not the location of the injury, but the location of the events or omissions giving rise to the claim.'" Ex parte Smith Wrecker Serv., Inc., 987 So. 2d 534, 538 (Ala. 2007). In Ex parte Guarantee Insurance Co., 133 So. 3d 862, 870-71 (Ala. 2013), which involved a breach-of-contract claim, this Court explained that "[a]ll the acts or omissions" alleged by the plaintiff in its complaint "would have been performed (or not performed)" by the defendant "in Montgomery County by agent or in Florida, where the decisions concerning the subject

1180624

policies that form the basis of [the plaintiff's] claim were made."²

Allstate presented an affidavit in support of its motion for a change of venue that demonstrated that "a substantial amount of Allstate's investigation, decision-making and handling of the claim submitted by Mr. Hobson occurred at Allstate's Office in Shelby County," Allstate's principal

²Although not mentioned by the parties, we note that in both Ex parte Elliott, 254 So. 3d 882, 885 (Ala. 2017), and Ex parte Alfa Mutual Insurance Co., 250 So. 3d 541, 544 (Ala. 2017), mandamus petitions involving motions for a change of venue based on the doctrine of forum non conveniens, this Court acknowledged that the parties did not dispute that venue was proper in the county where the accident underlying their claims for under-insured-motorist benefits had occurred. In each case, the "'event[] or omission[] giving rise to the claim'" Smith Wrecker, 987 So. 2d at 538 (quoting Suzuki, 940 So. 2d at 1009-10), for under-insured-motorist benefits was the automobile accident itself. In the present case, Harrison has asserted breach-of-contract and bad-faith claims based on Allstate's decision not to indemnify him in a wrongful-death action, and he is seeking damages for, among other things, emotional distress. The "event[] or omission[] giving rise to the claim" in this case is Allstate's decision to not indemnify Harrison, which the undisputed evidence indicates occurred in Shelby County.

1180624

place of business.³ Further, it is undisputed that both Hobson and Harrison are residents of Bibb County.

Allstate made a prima facie showing that venue was proper in Shelby County or Bibb County, but not Perry County, and it then became incumbent upon Harrison to rebut Allstate's prima facie showing. Ex parte Alabama Med. Ctr., 109 So. 3d 1114, 1116 (Ala. 2012) (citing Ex parte Movie Gallery, Inc., 31 So. 3d 104, 109 (Ala. 2009)). Harrison did not support his response to Allstate's motion for a change of venue with any evidence. It is well settled that unsworn statements of counsel and assertions in pleadings are not evidence. See Ex parte Bank of America, N.A., 39 So. 3d 113, 119 (Ala. 2009); Fountain Fin., Inc. v. Hines, 788 So. 2d 155, 159 (Ala. 2000); and Ex parte Gentile Co., 221 So. 3d 1066, 1069 (Ala. Civ. App. 2016). Although Harrison alleges that he was injured by Allstate's decision not to indemnify him in the wrongful-death action filed in Perry County, Harrison did not present any evidence to demonstrate that Allstate actually committed the

³Harrison argues that this evidence relates only to Allstate's handling of Hobson's claim and is unrelated to the events or omissions giving rise to Harrison's claims against Allstate. It is undisputed, however, that Harrison was not a policyholder with Allstate and that he did not file a claim. Harrison sought indemnity under Hobson's insurance policy.

1180624

alleged actions--breaching the contract and bad faith--anywhere other than Shelby County. Therefore, venue is not proper in Perry County under § 6-3-7(a)(1). See Pikeville Country Club, 844 So. 2d at 1189; and Guarantee Ins. Co., 133 So. 3d at 870-71.

Conclusion

Because Allstate has demonstrated that venue is improper in Perry County and is proper in Shelby County under § 6-3-7(a)(1) and (2), or Bibb County under § 6-3-7(a)(3), it has, likewise, demonstrated a clear legal right to have Harrison's action against it transferred to Shelby County or Bibb County. The trial court is directed to vacate its order denying Allstate's motion for a change of venue and to transfer the action in accordance with Rule 82(d)(3), Ala. R. Civ. P.⁴

⁴Rule 82(d)(3) provides, in pertinent part:

"In the event the venue of the action is or has become improper and venue is appropriate in more than one other court, a defendant sued alone or multiple defendants, by unanimous agreement, shall have the right to select such other court to which the action shall be transferred and, where there are multiple defendants who are unable to agree upon a transferee court, the court may transfer the action to any such other court."

1180624

PETITION GRANTED; WRIT ISSUED.

Bolin, Shaw, Wise, Bryan, Sellers, Mendheim, and
Mitchell, JJ., concur.

Parker, C.J., dissents.